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Margaret P. Lindsay; Aldrich, Nelson, Weight and Esplin; Attorneys for Appellee.
Kenneth A. Bronston; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Jeffrey Buhman; Deputy Utah County Attorney; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellant,	:	Case No. 20010772-CA
v.	:	
TRACY MANUEL VALDEZ,	:	Priority No. 2
Defendant/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM A FINAL JUDGMENT DISMISSING CHARGES FOR POSSESSION OF METHAMPHETAMINE IN A DRUG FREE ZONE WITH A PRIOR CONVICTION, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.§ 58-37-8(2)(A)(I) (1998); POSSESSION OF PARAPHERNALIA IN A DRUG FREE ZONE, A CLASS A MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37A-5(1) (1998); AND FALSE PERSONAL INFORMATION TO A PEACE OFFICER, A CLASS C MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-8-507 (1999), IN THE FOURTH JUDICIAL DISTRICT COURT, THE HONORABLE RAY M. HARDING, PRESIDING

KENNETH A. BRONSTON (4470)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
Heber M. Wells Building
160 East 300 South, 6th Fl.
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-1080

MARGARET P. LINDSAY
Aldrich, Nelson, Weight & Esplin
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200

Attorneys for Appellee

JEFFREY BUHMAN
Deputy Utah County Attorney

Attorneys for Appellant

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Heber M. Wells Building
160 East 300 South, 6th Fl.
P O Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-1080

JEFFREY BUHMAN
Deputy Utah County Attorney

Attorneys for Appellant

MARGARET P. LINDSAY
Aldrich, Nelson, Weight & Esplin
43 East 200 North
P.O. Box "L"
Provo, Utah 84603-0200

Attorneys for Appellee

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STATE OF UTAH

Plaintiff/Appellant, Case No 20010772-CA

v

TRACY MANUEL VALDEZ, Priority No 2

Defendant/Appellee

BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a final judgment dismissing charges for possession of methamphetamine in a drug free zone with a prior conviction, a first degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1998), possession of paraphernalia in a drug free zone, a class A misdemeanor, in violation of Utah Code Ann § 58-37a-5(1) (1998), and providing false personal information to a peace officer, a class C misdemeanor, in violation of Utah Code Ann. § 76-8-507 (1999), in the Fourth Judicial District Court, the Honorable Ray M Harding, presiding. This Court has jurisdiction of this case under Utah Code Ann §§ 77-18a-1(2)(a) (1999) and 78-2a-3(2)(j) (Supp 2001)

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

Whether the trial court erred as a matter of fact and law in concluding that defendant was unlawfully detained by investigating officers' request for his identification to allay their acknowledged concern for their safety?

A "bifurcated" review standard applies to this issue Underlying fact findings are

reviewed deferentially, and reversed only for "clear error." The court's conclusions of law however, are reviewed for correctness, allowing some "measure of discretion" as regards the application of legal standards to the facts *State v Pena*, 869 P 2d 932, 935-40 (Utah 1994)

This issue was preserved in the trial court in the prosecution's response to defendant's motion to suppress and at the hearing on the motion to suppress (R. 41, 72.9-11, 17, 26-29)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following determinative constitutional provision is determinative of this case

Fourth Amendment to the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant, Tracy Manuel Valdez, was charged possession of methamphetamine in a drug free zone with a prior conviction, possession of paraphernalia in a drug free zone, and giving false personal information to a peace officer (R. 14). Following a preliminary hearing, defendant was bound over on all charges (R. 16-17). The trial court granted defendant's motion to suppress evidence and dismissed the case (R. 51-54, 56-57) The State timely appealed the trial court's ruling (R 62). The Utah Supreme Court transferred the case to this Court (R 70).

STATEMENT OF THE FACTS

Preliminary Hearing

Midday, on 26 February 2001, police went to the home of Monique Young in Pleasant Grove, Utah, with a valid warrant for her arrest (R. 71:5, 18). While knocking on the door, Officer Robinson heard people in the house (R. 71:5). Some time passed before Young answered the door, at which point she was arrested (R. 71:5-6). Because Young was wearing boxer shorts, Robinson agreed to her request to put on a pair of pants (R. 71:6). Robinson and the officer accompanying him escorted Young back to the bedroom for safety reasons (R. 71:6-7, 15). There, Officer Robinson found defendant, wearing a long black trench coat, lying face down on the bed (R. 71:6, 8). Concerned that he could not see defendant's hands, Officer Robinson yelled, "Wake up. Let me see your hands," but defendant did not respond (R. 71:6). Suspecting that defendant was feigning sleep, Officer Robinson shook defendant and the bed, again requesting that defendant "wake up" and show his hands (R. 71:16). Immediately after defendant was evidently awake, Officer Robinson asked if he had any identification (R. 71:6, 19). Defendant responded negatively (R. 71:6-7). In response to the officer's further request, defendant identified himself as "Sean Tracy Michaels" (R. 71:7). However, as defendant spoke, Officer Robinson overheard Young whisper to the other officer that defendant's real name was Tracy Valdez (R. 71:7).

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[1] The facts are taken from the preliminary hearing, on which the parties stipulated to submit the motion to suppress (R. 72:3-4).

Officer Robinson then asked dispatch to check "Tracy Valdez" with the date of birth defendant had given him (R. 71 7) Dispatch reported back with a valid statewide warrant for defendant with a date of birth of 3 December 1961 instead of 4 December 1961, the date defendant had provided (R. 71:7-8). Officer Robinson asked again if defendant had any identification and this time defendant produced a Utah identification card from his right rear pocket (R. 71:8). The name on the card was Tracy Manuel Valdez with a date of birth of 3 December 1961 (R. 71 8) Officer Robinson handcuffed and arrested defendant on the statewide warrant, and for giving false personal information (R. 71 8) A search of defendant's person incident to his arrest yielded methamphetamine and paraphernalia (R 71:8-11). The arrest took place within one thousand feet of a day-care center and a post office (R. 71:11-12). Defendant also had two prior drug convictions (R. 71:12-13).

Argument at suppression hearing and ruling

Following the preliminary hearing, defendant moved to suppress evidence of all controlled substances found on his person (R. 32-39).[2] Defendant argued that his right to be free of unreasonable searches and seizures under the Fourth Amendment to the United States Constitution was violated because he was subjected to a level two detention without

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[2] Although defendant moved to suppress evidence of contraband found on his person, he nowhere argued that as a result of an alleged illegal search and seizure evidence supporting the charge of giving false personal information to a peace officer should be suppressed.

reasonable suspicion as soon as officers attempted to awaken him (R. 33-38).[1] In support, he relied on *State v. Deitman*, 739 P.2d 616 (Utah 1987) (per curiam), and *State v. Ray*, 998 P.2d 274 (Utah App. 2000), to support his claim that he was subjected to a level two detention, and *State v. Johnson*, 805 P.2d 761 (Utah 1991), to help support his claim that the detention was unjustified (R. 33-38). The prosecution opposed defendant's claims, arguing that the officers never initiated more than a level one encounter and, consequently, defendant's authority was inapplicable (R. 40-46). The prosecution also argued that, notwithstanding any determination as to the level of the encounter, the officer's request that defendant show his hands and identify himself was justifiable as a search incident to Ms. Young's arrest under *United States v. Chimel*, 395 U.S. 752, 89 S. Ct. 2034 (1969), and to ensure officer safety (R. 41; 72:9-11, 17, 26-29).

The trial court found that the officer's shaking and shouting at defendant in the confines of the arrestee's bedroom exceeded a level one encounter, but agreed with the prosecution that the officer's actions were justifiable, at least until they "could see defendant's hands and new [sic] they were in no danger" (R. 52). Beyond that point,

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[1] Defendant asserted in his motion to suppress that his claims were based on both the Utah and the United States Constitutions (R. 39). However, defendant relied in the trial court exclusively on cases decided only under the Fourth Amendment to the United States Constitution (R. 33-36). *See, e.g.*, *State v. Deitman*, 739 P.2d 616 (Utah 1987) (per curiam), *State v. Ray*, 998 P.2d 274 (Utah App. 2000), and *State v. Johnson*, 805 P.2d 761 (Utah 1991),. Therefore, this Court should limit its analysis to Fourth Amendment jurisprudence. *See State v. Davis*, 972 P.2d 388, 392 (Utah 1998) (declining to consider alternate state constitutional claims unsupported by separate legal analysis).

however, the court concluded the detention should have ended (R. 52) In support, the court relied on *Johnson*, ruling that the detention to ask defendant's name in this case was analogous to the improperly extended level two stop in that case (R. 52). Consequently, the court granted defendant's motion to suppress (R. 51).

SUMMARY OF ARGUMENT

The court correctly concluded that the officers had a reasonable concern for their safety when they encountered defendant acting suspiciously while they were executing an arrest warrant in private premises. However, the court erroneously found that the officers' safety concern abated when defendant showed them his hands. The court also failed to recognize that under the circumstances of the encounter and governing law, the officers were fully justified in either asking or demanding defendant identify himself where they were reasonably concerned for their safety. As a consequence of its erroneous factual findings, the court also arrived at incorrect legal conclusions in determining that the investigating officers unjustifiably expanded the scope of defendant's detention.

Further, even if the officers unjustifiably believed that defendant might be armed and dangerous, they were justified in either asking or demanding that defendant identify himself during a search incident to the arrest of defendant's companion. In the suspicious circumstances of their encounter with defendant, such request or demand was a justifiable, minimal intrusion within the balancing of interests entailed by any search or seizure under the Fourth Amendment.

ARGUMENT

THE TRIAL COURT FAILED TO RECOGNIZE THAT OFFICERS REASONABLY CONCERNED FOR THEIR SAFETY WERE AUTHORIZED TO ASK DEFENDANT TO IDENTIFY HIMSELF; EVEN IF THE OFFICER UNREASONABLY BELIEVED DEFENDANT TO BE ARMED AND DANGEROUS, HIS REQUEST FOR DEFENDANT'S NAME WAS A JUSTIFIABLY MINIMAL INTRUSION GIVEN THE CIRCUMSTANCES OF THE ENCOUNTER

Following a hearing on defendant's motion to suppress evidence, the trial court found that police officers, while executing a valid arrest warrant on defendant's companion, had sufficient and reasonable concern for their safety to justify their awakening defendant and directing his movements (Ruling, R. 50-54 at 52, attached at Addendum A). However, the court also found that the officers no longer had such concern after defendant showed them his hands and they knew they were in no danger and that defendant's detention was further extended by a warrants check. (R. 52). Consequently, the trial court concluded that the officers exceeded the scope of defendant's justifiable detention at the point they asked for his name and by subsequently requesting a futile warrants check (R. 52).

The trial court's findings are clearly erroneous. There is no record support for the trial court's factual findings that defendant displayed his hands, that the officers concerns for their safety were allayed before defendant was arrested, or that they conducted a futile warrants check.

As a consequence of its factual errors, the trial court incorrectly concluded that Officer Robinson's request for defendant's name, followed by the officer's discovery that

defendant had given him false information, improperly expanded the scope of his detention beyond the officers' reasonable concern for their safety (R. 52). The court's conclusion, however, is contrary to well established law authorizing police officers to ask for a suspect's identification during an investigative detention justified by a reasonable concern for the officers' safety, as in this case. Moreover, the court misapplied governing authority in concluding that defendant was unjustifiably detained. Finally, even if the officer lacked a reasonable concern for his safety, asking defendant his name was a justifiably minimal intrusion to protect himself incident to the arrest of defendant's companion.

A. The trial properly found that officers had a reasonable concern for their safety upon first encountering defendant.

In the seminal case, *Terry v. Ohio*, the United States Supreme Court held that police officers, for their protection, were authorized to conduct a limited search of persons reasonably believed to be armed and dangerous *Terry v Ohio*, 392 U.S. 1, 27, 92 S Ct 1868, 1883 (1968). *See State v Rochell*, 850 P 2d 480, 483 (Utah App. 1993) (recognizing authority to "pat down," or "frisk" when "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion") (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). "'The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.'" *State v Carter*, 707 P.2d 656, 659 (Utah 1985) (quoting *Terry*, 392 U S. at 27, 92 S Ct at 1883)

Here, the trial court correctly concluded that the officers had reasonable concern for

their safety at the beginning of their engagement with defendant. The officers were executing a valid arrest warrant on Ms. Young when they first encountered defendant (R. 71:5, 18). Immediately before entering the premises, Officer Robinson heard "people" within the house, after which some time passed before Young answered the door (R. 71:5-6). Accompanying Young back to her bedroom, Officer Robinson found defendant, wearing a long black trench coat, lying face down on the bed, apparently sleeping (R. 71:6, 8). It was midday (R. 71:5). Concerned for his safety, Officer Robinson repeatedly attempted to rouse defendant while asking defendant to show his hands (R. 71:6). When defendant failed to respond, the officer suspected that defendant was feigning sleep (R. 71:16).

The trial court recognized that police officers in this case, while executing an arrest warrant and confronting an unknown person who was acting evasively, had a reasonable concern that defendant might be armed and dangerous, which justified defendant's initial detention (R. 52, 54).[4] *See State v. Dorsey*, 731 P.2d 1085, 1092-93 (Utah 1986) (Zimmerman, J., concurring) (recognizing that investigating officer reasonably believed that individual, suspected of dealing narcotics and who furtively removed something from car seat when stopped, might be armed and dangerous); *State v. Leonard*, 825 P.2d 664, 670-71(Utah App. 1991) (concluding that officers had reasonable, articulable concern for their

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[4] Although not explicit, the trial court's conclusion, that "*[a]fter* the officers could see Defendant's hands and new [sic] they were in no danger, the detention should have ended" (R. 52) (emphasis added), implicitly recognized that defendant was lawfully detained out of a concern for officer safety *before* they could see his hands.

safety following chase of suspected narcotics dealer who made evasive driving maneuvers and hand movements and who gave police information inconsistent from his companion), *cert. denied*, 843 P.2d 1042 (Utah 1992); *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir.1983) (suspect properly ordered to lie on the floor when suspect had disobeyed police commands to raise his hands and had made furtive gestures); *State v. Horace*, 28 P.3d 753, 758-59 (Wash. 2001) (en banc) (finding reasonable basis for frisk of driver's companion wearing bulky zippered jacket and who might have feigned detachment from driver's extensive movements suggesting the hiding of a weapon).

However, the court also found that the officers no longer had such concern after defendant showed them his hands and they knew they were in no danger and that defendant's detention was further extended by a futile warrants check. (R. 52). These findings are clearly erroneous.

B. The trial court clearly erred in finding that the officers knew they were no longer in danger after defendant showed his hands and that they conducted a futile warrants check; rather, the record shows that defendant's continued detention was justified.

The trial court's factual findings, that officer Robinson had no concern for his safety after he saw defendant's hands and that the officers conducted a futile warrants check, are clearly erroneous.

"A trial court's factual findings will not be reversed absent clear error." *State v. Widdison*, 2001 UT 60, ¶60, 28 P.3d 1278 (citations omitted). To demonstrate that a finding of fact is clearly erroneous, the complaining party "must first marshal all the evidence that

supports the trial court's findings. After marshaling the supportive evidence, the appellant then must show that, even when viewing the evidence in a light most favorable to the trial court's ruling, the evidence is insufficient to support the trial court's findings." *State v. Gamblin*, 2000 UT 44, ¶17 n.2, 1 P.3d 1108 (citations omitted).

The trial court found that "[a]fter the officers could see Defendant's hands and [k]new they were in no danger, the detention should have ended" (R. 52).

The only evidence in support of the trial court's finding that the officers could see defendant's hands was Officer Robinson's testimony, "that [at the point the officer made his last request to see defendant's hands, defendant] kind of gets up and wakes up I would say" (R. 71:6). Contrary to the trial court's finding, there is no express evidence that defendant showed his hands to Officer Robinson or did anything else to allay the officer's concerns for his safety (R. 52). Also, there is no evidence that either officer knew he was no longer in danger for any reason. Rather, the circumstances of the encounter, recognized by the trial court to have justified the officers' reasonable concern for their safety at the outset, were intrinsically suspicious and justified defendant's continued detention. The record indicates that while executing the arrest warrant for defendant's companion, the police found defendant fully clothed, but purportedly asleep on the bed (R. 5-6). Even if defendant had shown his hands in response to the officer's request, a reasonably prudent police officer would still have entertained a reasonable belief that defendant might have been armed and dangerous. Upon engaging defendant, officers quickly became concerned that he was

feigning sleep in the middle of the day, while wearing a substantial coat capable of readily concealing a weapon, all before he had been patted down or identified (R. 71:6, 16).

As a matter of law and common sense, the mere display of a suspect's hands in such circumstances cannot circumscribe an investigative detention intended to relieve an officer's concern for his safety when the officer is authorized under *Terry* to also frisk a suspect's clothes for a weapon. *See State v. Potter*, 863 P 2d 40, 43 (Utah Ct. App. 1993) ("There is no bright line test for determining if reasonable suspicion exists. Rather, courts must look at the totality of the circumstances.") (citation omitted). Indeed, the officer's request for defendant's identification, typically requested as part of an investigative detention based on officer safety, indicates that Officer Robinson had not fully allayed his and his fellow officer's concerns for their safety.

Additionally, in support of its conclusion that defendant was subjected to undue detention after Officer Robinson asked for his name, the court made another finding, stating, "[i]t is worthy of note that the officers also ran a warrant check on the name Defendant gave them, although the check would not reveal any information that would establish Defendant's identity" (R. 52). In fact, Officer Robinson asked dispatch to check the name "Tracy Valdez," the name Young whispered and which correctly identified defendant and immediately led to the discovery of an outstanding warrant (R. 71:7-8). In sum, the trial court erroneously found that Officer Robinson knew he was no longer in danger after defendant showed him his hands and that defendant's detention was extended by a futile

warrants check. These clearly erroneous findings were central to the trial court's conclusion of law that the officers improperly extended defendant's detention at the point they asked for his identification.

C. A request for identification is an intrinsic part of an investigative detention based on concern for officer safety.

As a consequence of its factual errors, the trial court incorrectly concluded that Officer Robinson's request for defendant's name, followed by the officer's discovery that defendant had given him false information, *improperly* extended his level two detention (R. 52). The court's conclusion, however, is contrary to well established law authorizing police officers to ask for a suspect's identification during an investigative detention justified by a reasonable concern for the officers' safety, as in this case.

As noted in the preceding section, police officers, for their protection, are authorized to conduct a limited search of persons reasonably believed to be armed and dangerous. *See Terry*, 392 U.S. at 27, 92 S.at 1868. In *Terry*, the Court implicitly recognized that part of an officer's investigation of those reasonably detained on suspicion of committing a crime and being dangerous, was to ask for identification. *Id.* 392 U.S. at 28, 88 S. Ct. at 1883. Upholding the officer's detaining suspects in that case, the Court noted, "nothing in [the suspects'] response to his hailing them, identifying himself as a police officer, and *asking their names* served to dispel that reasonable belief [that the suspects were armed]." *Id.* (emphasis added). Innumerable cases following *Terry* have implicitly recognized that police officers may routinely request a suspect's identification in level two stops. *See, e.g., State*

v *Leonard*, 825 P 2d 664, 668 n 4 (Utah App 1991) (approving investigation to discover name of individual reasonably suspected of dealing narcotics), *Moore v State*, 55 S W 3d 652, 655 (Tex Crim. App. 2001) ("An investigative detention is a temporary and narrowly tailored investigation directed at determining a person's identity or maintaining the status quo while officers obtain more information ") (citation omitted)

In *Adams v Williams*, a case in which the an officer was held to have reasonably reached into the suspect's car to retrieve a gun based on an informant's tip in a level two stop, the United States Supreme Court made explicit what it had left implicit in *Terry* "A brief stop of a suspicious individual, *in order to determine his identity* or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v Williams*, 407 U S. 143, 146, 92 S Ct. 1921, 1923 (citing *Terry*, 392 U S. at 23, 88 S Ct. at 1881) (emphasis added).[3]

In cases similar to this one, courts have either implicitly or explicitly recognized that an officer, reasonably concerned for his safety, may either request or even demand that a detainee identify himself. In *United States v Murdock*, police entered an apparently

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[3] There are a variety of reasons for identifying a detainee If an initial investigation proves inconclusive and the detained suspect later commits crime, he will be almost impossible to locate if he was released without having been identified *See* 4 LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9 5(g) (3rd ed 1996) ("Without even that bit of information, subsequent apprehension of the released suspect, if he is later shown to have perpetrated the suspected crime or some other offense, will usually be impossible.") (citing President's Commission of Law Enforcement and Administration of Justice Task Force Report, Science and Technology 8 (1967))

unoccupied house at night, guns drawn, in response to a possible burglary. *United States v. Murdock*, 54 F.3d 1437, 1439 (9th Cir. 1995), *abrogation on other grounds recognized in Lalonde v. County of Riverside*, 204 F.3d 947, 957 (9th Cir. 2000). Entering the bedroom, they found Murdock lying on the bed beneath a blanket. *Id.* Because defendant was covered, the officers demanded that Murdock show his hands. *Id.* When Murdock immediately responded belligerently and refused to identify himself, the officers removed the blanket and found Murdock fully dressed. *Id.* On these facts, including Murdock's refusal to identify himself, the United States Court of Appeals for the Ninth Circuit approved a pat down which led to officers' finding Murdock's wallet and his identification. *Id.* at 1442.

Similarly, the court in *State v. Wilcox*, 435 A.2d 569 (N.J. Super. Ct. 1981), upheld the search of the defendant, reasonably detained in a criminal investigation. *Id.* at 571. The investigation followed the arrest of Wilcox's companion, for whose person, premises, and automobile a search warrant had been issued upon information that he was involved in the distribution of drugs. *Id.* at 570. After the police found the drugs, they approached Wilcox, who had arrived with his companion in the auto identified in the warrant, and asked him for identification. *Id.* Wilcox immediately appeared nervous and gave the officer a name, later found to be false. *Id.* However, the officer saw what appeared to be the bulge of a wallet in Wilcox's pants and asked Wilcox if he had any identification in the wallet. *Id.* As soon as Wilcox removed the wallet and thumbed through it, the officer noticed an identification for someone he knew was in jail. *Id.* The officer then searched Wilcox, found drugs, and

arrested him *Id* The court concluded that "the brief detention of defendant to ascertain his identity was a reasonable police investigatory procedure . . ." *Id.*

In *State v Flynn*, 285 N.W.2d 710 (Wis. 1979), *cert denied*, 449 U.S. 846, 101 S. Ct. 130 (1980), the court approved not merely a detention, but a *search* of a suspect to determine his identity, when he refused to cooperate in circumstances reasonably giving rise to a concern for officer safety. *Id.* at 718-19. Relying, in part, on state law allowing a police officer to demand the name and address of a person reasonably suspected of committing a crime, and *Terry* and *Adams*, the court stated, "Indeed, unless the officer is entitled to at least ascertain the identity of the suspect, the right to stop him can serve no useful purpose at all." *Id.* at 716.[6] The court reasoned that otherwise a non-complying suspect could readily thwart any police investigation. *Id.* at 716, 718. Balancing the need to discover Flynn's identity against his right to be free of unreasonable searches and seizures, the court found that the

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[6] *See* Utah Code Ann. § 77-7-15 (1999) ("A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions."); *Oliver v Woods*, 209 F.3d 1179, 1188-90 (10th Cir. 2000) (concluding officer entitled to qualified immunity in arresting motorist reasonably suspected of criminal activity under state statute criminalizing the interference with a lawful detention, where suspect refused to identify himself following police request under section 77-7-15, *Terry* and *Williams*). *See also United States v Trimble*, 986 F 2d 394, 397-98 (10th Cir.) (where a passenger in a car lawfully stopped by the police attempted to leave the area over objection of police officer, court held "when [the passenger] proceeded to leave the scene of the stop, [the officer] was entitled to detain him for purposes of identification in order to ascertain 'what's going on,'" and asserted "such action was in keeping with good police work, and the intrusion was minimal.") (citation omitted), *cert. denied*, 508 U S. 965, 113 S Ct. 2943 (1993).

frisk was undertaken without intent to harass and only to locate some identification and was therefore, reasonable *Id* at 718-19 Recognizing that the balancing of interests in search and seizure must necessarily be "flexible," the court concluded, "the scope of the search was no broader than was necessary to obtain the information, the need for which justified the intrusion in the first place" *Id* *See also Tuohy v State*, 776 So 2d 896, 899 (Ala Crim App 1999) (holding seizure of credit card for purposes of identification within the scope of investigative detention and asserting, "[w]e are aware of no constitutional proscription against asking an individual stopped pursuant to *Terry* to identify himself")

Even on less than reasonable suspicion that the suspect was potentially dangerous, officers might require the detainee's name to properly execute a warrant. In *Michigan v Summers*, the Court held that a search warrant for a house carries with it the authority to detain its occupants until the search is completed. *Id*, 452 U S 692, 705, 101 S Ct 2587, 2595 (1981). It would be absurd to think that the officers in *Summers* could not have asked the occupant of the house, legitimately detained incident to the execution of a search warrant, his name to determine that he was the home owner and thereby capable of assisting police officers in the search.

In this case, officers would readily have wanted to identify defendant on the chance that his name might readily identify him as dangerous Additionally, defendant's identity would have helped establish his connection with Ms Young or his familiarity with the home, information bearing on his potential for danger

Moreover, common sense dictates that if an officer is justified in patting down a suspect, then he is also authorized in undertaking the less intrusive investigation of asking for identification. *See* 4 LaFave, Search and Seizure at § 9 5(a) (indicating that *Terry* strongly suggests that some investigation should be conducted before a suspect is subjected to the intrusion of a frisk). *Cf State v Hall*, 1997 WL 528318 (Del Super) (concluding under state statute that officers were required first to inquire as to suspect's name before conducting a pat down), *see also* Utah Code Ann § 77-7-15 (1999) ("A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.").

In this case, Officer Robinson merely asked defendant for his identification, a request that defendant apparently voluntarily acceded to. That request was within the scope of defendant's detention, based on the officers' reasonable concern for their safety In sum, having concluded that the officers properly detained defendant out of a concern for their safety upon discovering him in suspicious circumstances while executing a valid arrest warrant, and having erroneously concluded that defendant's responses to Officer Robinson s inquiries and directions allayed the officers' concern for their safety, the trial court incorrectly concluded that defendant was improperly detained when officers asked him his name

D. The trial court incorrectly concluded that defendant was improperly detained when the investigating officer asked for his identification.

Based on its erroneous findings of fact, the trial court incorrectly concluded that defendant was improperly detained beyond the point he showed Officer Robinson his hands and the officers knew they were no longer in danger (R 52) The trial court exacerbated its incorrect conclusion by erroneously assuming that the detention was unnecessarily prolonged by the officers' conducting a futile warrants check (R 52)

"[T]he Constitution does not forbid all searches and seizures, it forbids only 'unreasonable searches and seizures '" *State v Rodriguez-Lopi*, 954 P 2d 1290, 1292 (Utah App 1998) (citing the Fourth Amendment to the United States Constitution and *Terry*, 392 U S at 9, 88 S Ct at 1873 (1968)). "Therefore, 'to determine whether a search or seizure is constitutionally reasonable, we make a dual inquiry (1) Was the police officer's action 'justified at its inception'? and (2) Was the resulting detention 'reasonably related in scope to the circumstances that justified the interference in the first place?'" *Id* (citations omitted) "[T]he length and scope of the detention must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible " *State v Hansen*, 2000 UT App 353, ¶11, 17 P 3d 1135 (citing *State v Johnson*, 805 P 2d 761, 763 (Utah 1991)) (quoting *Terry*, 392 U S at 19-20, 88 S. Ct. at 1878) "[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop " *Florida v Royer* 460 U S 491, 500 (1983) (citations omitted) "Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's

suspicion in a short period of time." *Id.*

In finding that defendant had already been unduly detained at the point at which, according to the trial court, defendant showed his hands and the officers knew they were no longer in danger, the trial court incorrectly applied *Johnson*. In *Johnson*, the defendant was a passenger in a car stopped for an equipment violation. *Id.* 805 P.2d at 762. The name on the driver's license was not the name of the registered owner, which the officer had checked before stopping the car. *Id.* Also, the driver was unable to produce the registration. *Id.* Reasoning on these facts that the car might be stolen, the officer asked Johnson for identification. *Id.* Johnson denied having a driver's license or any identification, but did give the officer her name and date of birth. *Id.* Without any questioning to allay his belief that the car might be stolen and without any information that the car was stolen, the officer returned to his patrol car and ran a warrants check on both occupants. *Id.* The check revealed that Johnson had outstanding warrants. *Id.* A search of her backpack uncovered drugs. *Id.*

The Utah Supreme Court found that the officer unreasonably detained the passenger on suspicion that the car was stolen just because neither occupant owned the car or could produce a registration certificate. *Id.* at 764. The court also noted that the officer failed to ask the driver and Johnson any questions that might have alleviated his suspicion that the car had been stolen. *Id.* The court held that given "the paucity of facts available to him, the officer's detention of the passenger beyond what was reasonably related in scope to the

traffic stop was not justified by an articulable suspicion that defendant had committed a crime." *Id.*

The trial court misapplied *Johnson* by concluding that the scope of defendant's detention was similarly unjustifiably expanded (R. 52). Unlike the officer in *Johnson* who never had sufficient facts concerning a possible car theft to justify further detention, Officer Robinson had observed defendant acting suspiciously at virtually the same time that he asked defendant for identification, behavior which the court found sufficient justification for detaining defendant out of a concern for safety (R. 71:6, 16). Further, *Johnson* did not decry the officer's asking the passenger for identification. Instead, the court criticized the officer's expanding the scope of the detention by initiating a warrants check without first discovering facts that might or might not have justified the deeper intrusion of a warrants check. Specifically, the court stated:

> [T]he leap from asking for the passenger's name and date of birth to running a warrants check on her severed the chain of rational inference from specific and articulable facts and degenerated into an attempt to support an as yet "inchoate and unparticularized suspicion or 'hunch.'"

Id. at 764 (quoting *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883).

In contradistinction to the officer's action in *Johnson*, Officer Robinson ran a check on defendant's identification only after defendant gave him the name "Sean Tracy Michaels" and after Young immediately whispered that his name was really "Tracy Valdez" (R. 71:7). As *Terry*, *Williams*, and their countless progeny, including *Johnson*, assert, asking a defendant for identification in circumstances justifying at least a brief detention "may be

most reasonable in light of the facts known to the officer at the time." *See Williams*, 407 U.S. at 146, 92 S. Ct. at 1923 (citing *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1879-80). Moreover, Officer Robinson's request for defendant's name, defendant's response, the revelation that defendant's response was probably false, and the officer's confirmation of the falsity was evidently an unbroken, rapid chain of events. Further, the testimony indicates that the officer's request for defendant's name followed immediately upon defendant's suspicious awakening and was plainly part of the officer's efficient effort to either confirm or dispel his concerns for his safety (R. 71:6, 16). Thus, the trial court's erroneous finding, that the officers unnecessarily prolonged the detention by running a futile warrants check on the name "Sean Tracy Michaels," rather than "Tracy Valdez," highlights its mistaken application of *Johnson* (R. 52).

E. Even if the officer unreasonably believed defendant to be armed and dangerous, his request for defendant's name was a justifiably minimal intrusion given the circumstances of the encounter.

"The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09, 98 S. Ct. 33, 332 (1997) (per curiam) (quoting *Terry*, 392 U.S. at 19, 88 S. Ct. at 1878). "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* at 109, 98 S. Ct. at 332 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578 (1975)).

"*Terry* and its progeny indicate an increasing trend to slant the balance of privacy rights versus safety interests in favor of the police as long as the intrusion is limited and reasonable." *State v. Lacy*, 468 S.E.d 719, 731 (W. Va. 1996). "What may have raised judicial eyebrows at the time the *Terry* decision was issued regarding police safety has become commonplace in advance sheets today." *Id.* "While it was once considered necessary . . . for a law enforcement officer to be 'justified in believing that the individual whose suspicious behavior he [or she] is investigating . . . *is* armed and presently dangerous to the officer,' (emphasis added), it now suffices, in appropriate circumstances, for the officer to be justified in believing that the individual *might* be armed and dangerous . . . . This development is a product of the times." *United States v. Clark*, 24 F.3d 299, 304, 306 (D.C. Cir. 1994) (emphasis in original) (quoting *Terry*, 392 U.S. at 24, 88 S. Ct. at 1881). "[I]n judging the reasonableness of the actions of the arresting officer, the circumstances are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *Cousart v. United States*, 618 A.2d 96, 100 (D.C. Cir. 1992 (en banc) (citations omitted), ***cert. denied***, 507 U.S. 1042, 113 S. Ct. 1878 (1993).

Even if the circumstances of this case showed only a marginal basis for detaining defendant, Officer Robinson's immediate request for defendant's identification when defendant was finally roused was justifiable as a "de minimus" intrusion. In *Womack v. United States*, 673 A.2d 603 (D.C. Cir. 1996), *cert denied*, 519 U.S. 1156, 117 S. Ct. 1097 (1993), the court stated: "The use in the Fourth Amendment of the adjective 'unreasonable'

imports a command of proportionality to that Amendment's jurisprudence The greater the restriction on the seized individual's liberty, the more substantial the justification for such a restriction must be A lesser intrusion, on the other hand, requires a correspondingly lesser showing " *Id* at 608 (citations omitted)

Assuming, *arguendo*, that the circumstances of the officers' confrontation with defendant did not give rise to a reasonable belief that defendant was armed and dangerous Officer Robinson's request, or even insistence, that defendant identify himself did not violate defendant's Fourth Amendment rights As the prosecution correctly argued, under *Chimel v California*, 395 U S 752, 89 S Ct 2034 (1969)), the officers were entitled to take at least minimal precautions to protect themselves from possible danger *incident to Ms Young's arrest*, apart from any particularized danger posed by defendant (R. 71 10-11, 26-27)

"'A contemporaneous, warrantless search of the area within an arrestee's immediate control is permissible for the purpose of recovering weapons the arrestee might reach, or to prevent concealment or destruction of evidence of the crime.'" *State v Gallegos*, 967 P 2d 973, 978 (Utah App. 1998) (quoting *State v Harrison*, 805 P 2d 769, 784 (Utah App 1991) (citing *Chimel*, 395 U S. at 763, 89 S Ct at 2040) "An arresting officer may, without a warrant, lawfully search the area surrounding the person he or she is arresting if (1) the arrest is lawful, (2) the search is of the area within the arrestee's immediate control, and (3) the search is conducted contemporaneously to the arrest[ ]" *Id* (citations omitted) "'Custodial arrests are often dangerous, the police must act decisively and cannot be

expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp.'" *Id.* at 979 (quoting *United States v Bennett*, 908 F 2d 189, 193 (7th Cir 1990)).

Although the search in *Gallegos*, did not involve the arrestee's companions, as in this case, this Court recognized that circumstance *Id* at 980 n.5 (citing *Bennett*, 908 F 2d at 193) (upholding mattress search where "officers reasonably feared that someone else was going to come to the room who knew where the other weapons were or that the defendants would position themselves to take advantage of any hidden weapons or instrumentalities") *See also United States v Berryhill*, 445 F.2d 1189, 1193 (9th Cir. 1971) (providing for the automatic frisk of an arrestee's companions without particular, individualized suspicion and asserting, "[i]t is inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance"). *Cf. Maryland v Buie* 494 U S. 325, 334, 110 S. Ct. 1093, 1098 (1990) (holding that during a protective sweep "as an incident to the arrest the officers could, as a precautionary matter and *without probable cause or reasonable suspicion*, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched") (emphasis added).

Officer Robinson's request or demand for defendant's name was fully justified even if he lacked sufficient reasonable suspicion to detain defendant on the belief that defendant

was armed and dangerous. Under *Terry* and *Williams*, an officer may frisk and detain a suspect to obtain identification on reasonable suspicion that his safety is threatened. In such circumstances, as argued in section C, a request, or even demand, for identification is still less an intrusion than a frisk. However, if incident to the arrest of the suspect's companion a police officer may search an arrestee's companion on *less than reasonable suspicion* that he is involved in criminal activity or poses an imminent danger, the officer's *mere request or demand* for identification, a much lesser intrusion on a person's privacy, is still more justifiable in the balancing of Fourth Amendment interests.

In the circumstances of this case, Officer Robinson was fully authorized to request or demand defendant's name. At the time the officers executed the arrest warrant, defendant lay on a bed in a trench coat in Ms. Young's bedroom, apparently in close proximity to her (R. 71:6). In what Officer Robinson believed to be a subterfuge in feigning sleep at midday, defendant failed to respond to the officer's attempts to awaken him (R. 71:6, 16). The trial court found these actions gave weight to the officer's expressed concern for his safety and determined that defendant was reasonably detained at the outset (R. 52). As discussed in section C, above, defendant's detention was still justified when Officer Robinson asked to see his identification. However, unlike the officers in *Flynn*, which upheld a *search* of defendant's for identification, Officer Robinson did not search defendant for his identification. Rather, the officer asked, or, at most, demanded, defendant provide identification (R. 71:6). *See People v. Long*, 234 Cal. Rptr. 271, 278 (Cal. Ct. App. 1987)

(upholding demand, as opposed to search, for identification of suspect reasonably detained and making suspicions movements and observing, "[m]easured against the obvious and substantial need for police recording the identity of a person suspected of having committed a crime, we find reasonable the minimal intrusion involved here in requiring the production of identification").

There is no evidence to suggest that Officer Robinson would have searched defendant for identification. Instead, when defendant immediately identified himself as "Sean Tracy Michaels," the officer fortuitously discovered that defendant had probably identified himself falsely, which justifiably then led to the officer's identification check and the discovery of defendant's outstanding warrant. Indeed, the officer selected the least intrusive means to dispel concerns for his safety. Balanced against the officers' concerns for their safety, the intrusion, if at all, in asking defendant for his identification, was minimal and within the purview of a valid search incident to arrest

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that this Court reverse the trial court's granting of defendant's motion to suppress evidence and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 18th day of March, 2002

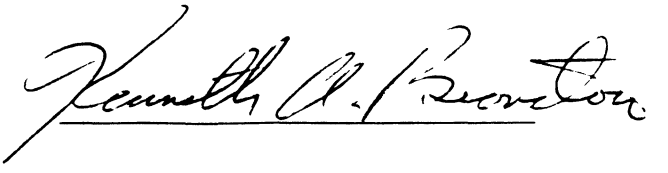
MARK L. SHURTLEFF
Attorney General

Kenneth A. Bronston

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellant were mailed, postage prepaid, Margaret P. Lindsay, Aldrich, Nelson, Weight & Esplin., attorneys for appellant, 43 East 200 North, P.O. Box "L," Provo, Utah 84603-0200 this 11th day of March, 2002.



ADDENDUM A

FILED
Fourth Judicial District Court
of Utah County, State of Utah

1-31-01 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. TRACY MANUEL VALDEZ, Defendant.	**RULING** Case No. 011400986 Judge Ray M. Harding

This matter comes before the Court on Defendant's Motion to Suppress. The Court has reviewed the file, considered the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, issues the following:

RULING

On February 26, 2001, Officer Bryan Robinson went to the home of Monique Young in Pleasant Grove with a valid warrant for her arrest. She answered the door wearing boxer shorts and asked to put on a pair of pants. The officer agreed and escorted her back to the bedroom. There the officer noticed a male lying face down on the bed. The man was evidently asleep because Officer Robinson had to shake him and yell at him for the man to wake up. Officer Robinson was concerned that he could not see the man's hands. After the man awoke, Officer Robinson asked him for his identification, which the man stated he did not have. The officer then asked the man for his name and birth date. The man responded with the name of Sean Tracy Michaels. Officer Robinson ran a warrants and an NCI check on that name. Officer Robinson had also overheard Monique Young whispering to the assisting officer after the Defendant had given the name of Sean Tracy Michaels that the man's true name was Tracy Valdez. Officer

Robinson ran a warrants check on that name as well. The warrants checks turned up a valid warrant for Tracy Valdez. A search incident to arrest turned up methamphetamine on the person of the Defendant.

Defendant argues that this situation is similar to the one faced by the passenger-defendant in *State v. Johnson*, 805 P.2d 761 (Utah 1991). In *Johnson*, an officer pulled over a car with faulty brake lights. The officer noticed that the name on license was not that of the registered owner. Suspecting the car might be stolen, the officer asked for the name and birth date of the passenger and then ran a warrants check on the driver and passenger. The Court ruled that

> the leap from asking for the passenger's name and date of birth to running a warrants check on her severed the chain of rational inference from specific articulable facts and degenerated into an attempt to support an as yet "inchoate and unparticularized suspicion or 'hunch.'"

Id. at 764.

The State here argues that this case is distinguishable in that *Johnson* was a level two stop and the current Defendant was only subjected to a level one encounter until reasonable suspicion to detain him had arisen. This Court disagrees.

> There are generally three levels of constitutionally permissible encounters between law enforcement officers and the public:
> "(1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an 'articulable suspicion' that the person has committed or is about to commit a crime; however, the 'detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop'; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed."
>
> A level one encounter "is a voluntary encounter where a citizen may respond to an officer's inquiries but is free to leave at any time." State v Jackson, 805 P.2d 765, 767 (Utah Ct. App. 1990); accord Bean, 869 P.2d at 986 ("'[A] seizure within the meaning of the fourth amendment does not occur when a police officer merely approaches an individual on the street and questions him, if the person is willing to listen.'") (citation omitted). "As long as the person 'remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.'"

> With a level two stop, however, the person is seized for purposes of the Fourth Amendment, "when the officer '"by means of physical force or show of authority has in some way restrained the liberty"' of a person." Hence, a level one encounter becomes a level two stop and "a seizure under the fourth amendment occurs when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave." This is true "even if the purpose of the stop is limited and the resulting detention brief."
>
> "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

Salt Lake City v Ray, 998 P 2d 274, 277 (Utah App 2000) (citations omitted).

In the present case, the officers had exceeded a level one encounter before the questioning began. The testimony was that the Defendant was shouted at and physically shaken by an officer before any questioning began. The encounter occurred not on a public street but in a private bedroom with two officers present. The officers already had someone in custody. A reasonable person in that situation would not have felt at liberty to disregard the officer's question or walk away.

After the officers could see Defendants hands and new they were in no danger, the detention should have ended.

> The length and scope of the detention must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible."

State v Johnson, 805 P.2d 761, 762 (Utah 1991) While Monique Young's statement may have given rise to an articulable suspicion that Defendant had given the officers false information, the Defendant had already been improperly detained at that point. It is worthy of note that the officers also ran a warrant check on the name Defendant gave them, although the check would not reveal any information that would establish Defendant's identity.

CONCLUSION

For the above reasons, the Court hereby rules that:

1. Defendant's Motion to Suppress is GRANTED.

DATED this 27th day of July, 2001.

RAY M. HARDING, JUDGE

MAILING CERTIFICATE

I hereby certify that on the 31st day of July, 2001, I mailed a true and correct copy of the foregoing to the following, with postage prepaid thereon.

Richard P Gale, 245 North University Avenue, Provo, UT 84601

Kay Bryson / Jeffrey R. Buhman, 100 East Center Street, Suite 2100, Provo, UT 84606

Deputy Court Clerk